INTERIOR BOARD OF INDIAN APPEALS

First National Bank of Gordon, Nebraska v. Acting Deputy Commissioner of Indian Affairs

37 IBIA 101 (01/10/2002)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

FIRST NATIONAL BANK OF	:	Order Affirming Decision
GORDON, NEBRASKA,	:	
Appellant	:	
	:	
v.	:	Docket No. IBIA 00-42-A
	:	
ACTING DEPUTY COMMISSIONER OF	:	
INDIAN AFFAIRS,	:	
Appellee	:	January 10, 2002

Appellant First National Bank of Gordon, Nebraska, seeks review of a January 14, 2000, decision issued by the Acting Deputy Commissioner of Indian Affairs (Deputy Commissioner), denying payment on a Bureau of Indian Affairs (BIA) loan guaranty issued to Appellant. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

Background

In late 1994 and early 1995, Donald Standing Elk (Borrower), a member of the Oglala Sioux Tribe, developed plans to purchase and operate a truck stop in Gordon, Nebraska. 1/ The project was to be financed through a loan from Appellant. In early 1995, Appellant applied to BIA for a 90 percent loan guaranty. On April 5, 1995, BIA conditionally approved an 80 percent loan guaranty. BIA ultimately approved an 80 percent loan guaranty and issued to Appellant Loan Guaranty Certificates G953D1A0603 (for a term loan of $160,000) and G953B1A0604 (for a $40,000 line of credit). 2/

Appellant and the Borrower closed on the loan on or about July 19, 1995.

In its first quarterly report on these loans, dated October 4, 1995, Appellant indicated that the term loan had a principal balance of $160,000 and an interest balance of $1,699.80, for a total balance of $161,699.80. It also indicated that the line of credit loan had a principal

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1/ There are apparently two businesses associated with the truck stop: the truck stop itself and an associated café that could be operated separately. For purposes of this decision, the Board will refer to both parts of the truck stop as a single business.

2/ Many documents generated by Appellant indicate that BIA guaranteed 90 percent of the loan. There is no evidence in the administrative record for more than an 80 percent guaranty.

balance of $40,000 and an interest balance of $842.46, for a total balance of $40,842.46. Appellant listed the status of the loans as "current" and showed a loan guaranty classification of "program standard," which is defined to mean that the borrower is performing and the loans are marginally secured.

Appellant subsequently provided BIA with additional quarterly reports indicating that the loans were both current.

On December 28, 1996, Appellant wrote to BIA about the possibility of restructuring the loans in the amount of $265,000, again asking for a 90 percent BIA guaranty. This letter indicated that Appellant had loaned an additional $22,000 to the Borrower at closing, and had subsequently made other loans so that the Borrower had incurred debt of $63,000 outside the loan guarantees. This appears to be the first indication Appellant gave BIA that there were problems with the loans.

Although BIA apparently did not respond to Appellant in writing, Appellant does not dispute that BIA told it to submit a new loan guaranty application for review. The administrative record does not contain a 1996 restructuring application, and Appellant does not contend that it submitted an application at that time.

The December 31, 1996, quarterly report indicated that the line of credit loan was current, but that the term loan was delinquent. It classified the loans as "substandard," meaning that the Borrower's repayment capability and/or security was weak. The loan balances shown were $154,928.72 for the term loan and $45,942.19 for the line of credit loan.

On July 28, 1997, Appellant notified BIA that the Borrower was 73 days delinquent on the term loan. Despite this, it stated that it did not consider the loan to be in default because the Borrower was actively trying to sell the business and three parties were interested in purchasing. Appellant stated that it would consider the loan to be in default only when there was no active attempt to sell or there were no buyers with intent.

No sale occurred. Instead, the December 31, 1997, quarterly report again showed the status of the line of credit loan as current and that of the term loan as delinquent, and classified the loans as substandard. However, the loan balances had grown to $161,034.42 for the term loan, and $50,053.41 for the line of credit loan.

On February 25, 1998, Appellant sent BIA a proposed loan modification and extension agreement. The proposed modification would have allowed the Borrower to lease certain real and personal property subject to the loans for $2,000 per month, payable $500 per week. The lease payments were to be applied against the guaranteed loans according to a set schedule. The proposal would also have required the Borrower to list the property for sale, and included an acknowledgment by the Borrower that he was in default on the guaranteed loans. BIA responded on or about March 2, 1998, stating:

> We respectfully decline to be part of this lease arrangement. However, we acknowledge the fact that leasing this business will cause a change in the plan of operation and requires our approval. Therefore, we concur only with your intent to lease the business. These lease payments are required to be equal to or greater than the scheduled loan guaranty payments and will be applied according to lien positioning. All other terms and conditions outlined in the Loan Guaranty Agreement, CFR, Form-4755 and attachment will remain unchanged.

Appellant wrote to BIA on March 11, 1998. Appellant stated its understanding that it was required to foreclose on the real property and repossess the personal property securing the loan unless the Borrower was allowed, with BIA approval, to service the loan in a manner that differed from the original proposal. Appellant indicated that there was an outstanding balance in excess of $163,000 on the term loan and in excess of $50,500 on the line of credit loan. BIA responded by informing Appellant that Appellant appeared to misunderstand its procedural responsibilities concerning the proposed action. BIA stated:

> If [Appellant] is requesting concurrence under the "default" section of the Loan Guaranty Agreement, then [Appellant] must notify the BIA and follow the procedures under this section. If you are requesting a restructure, modification, or extension under the "modification" section, we will need an application from [Appellant]. The application should include a current balance sheet, historical and current income statements, a comprehensive analysis, and justification for this request from [Appellant]. Also, you should include a statement that [Appellant] has adhered to all terms and conditions of the original guaranty.

Appellant wrote the Borrower two letters on April 30, 1998. In one letter, Appellant notified the Borrower that it was accelerating the entire remaining balances on four loans, not including the two BIA guaranteed loans. The four loans had outstanding principals totaling $70,308.07. An additional $9,814.48, was due as accrued interest. In its second letter to the Borrower, Appellant notified the Borrower that it was also accelerating the remaining balances on the two BIA guaranteed loans. In a third letter dated April 30, 1998, Appellant informed BIA that the two guaranteed loans were in default, that it had made protective advances to the Borrower, and that it was planning to liquidate loan collateral. Appellant also stated its belief that it could not foreclose on the Borrower's trust real property which had been mortgaged to secure the loans.

On July 10, 1998, Appellant notified BIA that the Borrower had filed for bankruptcy. Appellant began asking BIA for advice and guidance on how to proceed on certain matters. BIA did not respond, but instead referred the questions to the Department's Office of the Solicitor. Appellant then began asking for assistance from the Office of the Solicitor.

On July 17, 1998, Appellant responded to a letter from the Bankruptcy Trustee and sent a copy of that response to BIA. In its response, Appellant stated that Appellant "closed the truck stop and rented the restaurant business to third parties" in 1997.

Following the conclusion of the bankruptcy proceedings, Appellant liquidated some of the collateral securing the loans. It appears that this process yielded $75,366.48.

On October 21, 1999, Appellant submitted a claim to BIA for $129,546.18, the unliquidated balance of the loans. Appellant contended that it "duly and timely reported to the BIA representatives" all of the problems with the loans.

On January 14, 2000, the Deputy Commissioner denied Appellant's claim after finding that Appellant had failed to comply with the regulations in 25 C.F.R. Part 103. In particular, the Deputy Commissioner cited violations of 25 C.F.R. §§ 103.22, 103.36(a), and 103.36(d).

Appellant appealed to the Board. Appellant essentially adopted its notice of appeal as its opening brief. The Deputy Commissioner filed an answer brief. Appellant did not file a reply brief.

Discussion and Conclusions

25 C.F.R. § 103.36 (2000) is central to this case. 3/ That section provides in pertinent part:

> (a) Within 45 calendar days after the occurrence of a default, the lender shall notify the Commissioner by certified or registered mail showing the name of borrower, guaranty certificate number, amount of unpaid principal, amount of principal delinquent, amount of interest accrued and unpaid to date of notice, amount of interest delinquent at time of notice, and other failure of the borrower to comply with provisions of the loan agreement. Within 60 calendar days after default on a loan, the lender shall proceed as prescribed in either paragraph (b), (c), or (d) of this section, unless an extension of time is requested by the lender and approved by the Commissioner. The request for an extension shall explain the reason why a delay is necessary and the estimated date on which action will be initiated. Failure of the lender to proceed with action within 60 days or the date to which an extension is approved by the Commissioner shall cause the guaranty certificate to cease being in force or effect. If the Commissioner is not

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3/ 25 C.F.R. Part 103 was revised in 2001. At all times relevant to this appeal, the version of Part 103 that was in effect was the same as the 2000 version. The Board therefore quotes the 2000 version of Part 103.

All further citations to Part 103 are to the 2000 version.

> notified of the failure of a borrower to make a scheduled payment or of other default within the required 45 calendar days, the Commissioner will proceed on the assumption that the scheduled payment was made and that the loan agreement is current and in good standing. The Commissioner will then decrease the amount of the guaranty pro rata by the amount of the due installment and the lender will have no further claim for guaranty as it applied to the installment, except for the interest subsidy on guaranteed loans which may be due.
>
> (b) The lender may make written request that payment be made pursuant to the provisions of the guaranty certificate or guaranty agreement. * * *
>
> (c) The borrower and the lender may agree upon an extension of the repayment terms or other forbearance for the benefit of the borrower. * * * Agreements between a lender and a borrower shall be in writing and will require approval by the Commissioner.
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> (d) The lender may advise the Commissioner in writing that suit or foreclosure is considered necessary and proceed to foreclosure and liquidation of all security interests. * * *.

The primary questions raised in this case are: When did default occur and when did Appellant take action as required by 25 C.F.R. § 103.36? Although Appellant notified BIA that the loans were in default in its April 30, 1998, letter, it did not give an actual date on which it considered default to have occurred. Nor does it do so in this appeal. Appellant appears, however, to suggest that default does not occur until it says it does.

The Board has previously addressed the question of when default occurs. In Security State Bank, Dunseith, North Dakota v. Director, Office of Economic Development, 33 IBIA 225 (1999), the Board rejected an argument that default does not occur until the lender elects to take one of the actions authorized under a credit agreement. The Board held: "Nothing in the Credit Agreement, let alone the regulations in 25 C.F.R. Part 103, supports the notion that no default exists until a remedy is invoked by the [lender]." 33 IBIA at 234. The Board referred to the definition of "default" in 25 C.F.R. § 103.1, to find that the borrower in Security State Bank was in default when the Internal Revenue Service filed a tax lien against it.

The Board discussed this issue further in Marquette Bank, N.A. v. Acting Director, Office of Economic Development, 35 IBIA 161 (2000). The Board there found no support for the argument that default does not occur until the lender declares a default. 35 IBIA at 170.

The default provision of each security agreement here provides in pertinent part: "I will be in default if any one or more of the following occur: (1) I fail to make a payment on time or in the amount due; * * * (3) I fail to pay, or keep any promise, on any debt or agreement I have with you * * *."

Following its precedents, the security agreements, and the regulations, the Board concludes that default occurred here when the Borrower first failed to make a payment when due.

The loan documents for the line of credit loan indicate that the loan was to be repaid to zero annually. Although it is not clear from the loan documents whether "annually" refers to a calendar year or to the annual anniversary of the loan, for purposes of this decision the Board will assume that the only payments due under the line of credit loan were annual repayments to zero, which were due on the loan's anniversary date.

Appellant has not submitted any payment history records in support of its claim for reimbursement. The Board is therefore forced to rely on the quarterly reports that Appellant filed. It finds no evidence that the Borrower made even a single payment on the line of credit loan. Appellant's first quarterly report, dated October 4, 1995, showed that $40,000 had been advanced to the Borrower under this loan, and that there was an outstanding principal amount of $40,000 and an interest amount of $842.46, for a total outstanding balance of $40,842.46. The next quarterly report included in the materials before the Board was from April 1, 1996. That report shows an outstanding principal amount of $40,000 and an interest amount of $2,875.61, for a total outstanding balance of $42,875.61. In its claim for reimbursement on the guaranteed loans, Appellant indicated that the reimbursement it sought for this loan was the original principal of $40,000 plus accrued interest in the amount of $18,235.87. Not one of Appellant's quarterly reports shows anything other than an outstanding principal balance of $40,000 and constantly increasing interest balances. These figures are not consistent with a loan that has been repaid to zero at any time, let alone annually.

Despite this, Appellant declared this loan to be "current." Although it appears likely that the loan was in default from the time the very first loan payment was due, the Board finds that there is not enough information before it for a precise determination as to when that payment was due. However, assuming that no payments were due on the line of credit loan until the end of the "year," at which time the Borrower was required to repay the loan to zero, the Board finds that default occurred at the very latest when the loan was not repaid to zero. Therefore, depending upon the meaning of "annually," default occurred either at the end of calendar year 1995, or on July 19, 1996, the anniversary date of the loan. In an effort to err on the side of caution by giving Appellant the benefit of the doubt raised by the imprecise information with which it supported its claim for reimbursement, the Board finds that default occurred on or before July 19, 1996. 4/

25 C.F.R. § 103.36(a) required Appellant to report the line of credit loan as being in default within 45 days of default. Based on a default date of July 19, 1996, Appellant should have reported the loan as being in default by September 3, 1996 (September 2, 1996, the 45th

4/ If the Board has erred in this analysis, Appellant has only itself to blame for failing to present any payment history information either with its claim for reimbursement or on appeal.

day after July 19, 1996, was a Federal holiday). Appellant first reported the line of credit loan as being in default by letter dated April 30, 1998, more than 45 days after default occurred.

Appellant reported the term loan as delinquent on its December 1996 quarterly report. On its March 1997 quarterly report, Appellant added a comment: "A couple payments are late. We are waiting for more information or guaranty." On July 28, 1997, Appellant told BIA that the loan was 73 days delinquent, but stated that the loan was not in default because the Borrower was actively trying to sell the property and there were potential buyers. Although Appellant reported that the loan was in default on its March 1998 quarterly report, it did not notify BIA that the loan was in default until April 30, 1998. 5/

Again following its precedents, the security agreement, and the regulations, and in the absence of definitive payment information from Appellant, the Board finds that the Borrower defaulted on the term loan prior to March 31, 1997, the first quarterly report in which Appellant acknowledged that payments were late. However, the Board will give Appellant the benefit of the doubt and use March 31, 1997, as the date of default. Therefore, under 25 C.F.R. § 103.36(a), Appellant was required to notify BIA that the term loan was in default by May 15, 1997. April 30, 1998, the date of Appellant's letter notifying BIA that the Borrower was in default on the term loan, is more than 45 days after default occurred.

25 C.F.R. § 103.36(a) further required Appellant to notify BIA of the action it was taking in regard to the defaults on both loans within 60 days of the defaults. That would be September 17, 1996, for the line of credit loan and May 30, 1997, for the term loan. As previously stated, the first notification Appellant gave BIA as to the action it was taking in regard to the defaults was in its April 30, 1998, letter.

By failing to provide the notifications required by 25 C.F.R. § 103.36, Appellant subjected itself to the penalty set forth in 25 C.F.R. § 103.36(a), i.e., "Failure of the lender to proceed with actions within 60 days or the date to which an extension is approved by the Commissioner shall cause the guaranty certificate to cease being in force and effect."

Appellant argues, however, that its failure to comply with the regulation should be excused. Appellant's main argument appears to be that the regulations in 25 C.F.R. Part 103, and specifically in § 103.36(b), (c), and (d) are inconsistent and difficult to reconcile.

Appellant appears to believe that it was required to take action under 25 C.F.R. § 103.36(b), (c), and (d). There is no basis for this belief. Subsection 103.36(a) clearly states that a "lender shall proceed as prescribed in either paragraph (b), (c), or (d) of this section."

5/ Appellant does not argue that its quarterly reports constituted notice under 25 C.F.R. § 103.36(a). The appellant in Security State Bank, did make this argument, which the Board rejected. See 33 IBIA at 236-37.

(Emphasis added.) The Board rejects Appellant's argument that it should be excused from compliance with 25 C.F.R. § 103.36 because subsections 103.36(b), (c), and (d) are irreconcilable. The paragraphs present three different choices of action for a lender upon a borrower's default, not three steps in a default process.

Appellant raises several arguments that challenge the policy decisions underlying the promulgation of 25 C.F.R. § 103.36. The Board has no authority to second-guess BIA's policy decisions or to declare a duly promulgated Departmental regulation invalid for policy or other reasons. See, e.g., Marquette Bank, N.A., 35 IBIA at 173; Tanana Chiefs Conference, Inc. v. Acting Associate Alaska State Director, Bureau of Land Management, 33 IBIA 51, 53 (1998), and cases cited there.

Appellant contends that 25 C.F.R. § 103.36 exceeds the congressional grant of authority found in 25 U.S.C. §§ 1491 and 1492.

Section 1491 provides:

> In the event of a default of a loan guaranteed hereunder, the holder of the guaranty certificate may immediately inform the Secretary in writing of such default and the Secretary shall thereupon pay to such holder the pro rata portion of the amount guaranteed and shall be subrogated to the rights of the holder of the guaranty and receive an assignment of the obligation and security. The Secretary may cancel the uncollectable portion of any obligation, to which he has an assignment or a subrogated right under this section. Nothing in this section shall be construed to preclude any forbearance for the benefit of the borrower as may be agreed upon by the parties to the loan and approved by the Secretary. The Secretary may establish the date, not later than the date of judgment and decree of foreclosure or sale, upon which accrual of interest or charges shall cease.

Section 1492 is not applicable to this case because it deals solely with insured loans, which are not at issue here.

In making this argument, Appellant ignores 25 U.S.C. § 1494, which provides:

> Any evidence of guaranty or insurance issued by the Secretary shall be conclusive evidence of the eligibility of the loan for guaranty or insurance under the provisions of this chapter and the amount of such guaranty or insurance: *Provided*, That nothing in this section shall preclude the Secretary from establishing, as against the original lender, defenses based on fraud or material misrepresentation or bar him from establishing, by regulations in force at the date of such issuance or disbursement, whichever is the earlier, partial defenses to the amount payable on the guaranty or insurance.

The Board finds that the regulation does not exceed the grant of congressional authority. However, even if it had agreed with Appellant's argument, as just mentioned, the Board lacks authority to declare a duly promulgated Departmental regulation invalid.

Appellant contends that it should not be penalized because it was attempting to carry out the wishes of Congress by providing financing on the most impoverished Indian reservation in the United States, and by encouraging and nurturing a member of that tribe. Even assuming that Appellant was motivated by good intentions, that fact does not excuse compliance with the regulations. Despite Appellant's suggestions that it had no choice other than to take immediate collection action if it notified BIA of a default, 25 C.F.R. § 103.36(c) authorizes a lender to extend the repayment terms or to forbear from immediate action, with BIA approval. If Appellant believed that forbearance was appropriate, it should have sought BIA approval of that option. 6/

Appellant argues that BIA should be estopped from denying its claim because the Superintendent, Pine Ridge Agency, BIA (Superintendent), tacitly approved Appellant's 1998 proposed modification and extension of the loans. The Board first notes that Appellant failed to inform BIA that both of the loans were in default at the time it submitted its modification proposal in February 1998. However, even if it could get past the fact that the loans were in default, the Board finds nothing in the Superintendent's response to Appellant that is even arguably an approval–tacit or otherwise–of the proposal. The Superintendent stated that "we concur only with your intent to lease the business." There is no way this statement can be read as approval of the entire modification proposal.

Furthermore, Appellant has not shown that even one element necessary for estoppel exists in this case. As the Board has previously noted, there are four elements that traditionally must be present for a finding of estoppel: (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury. Here, the first and third elements are not met because Appellant knew the facts, not BIA. The second and fourth elements are not met because BIA took no action and made no representation which Appellant could reasonably have viewed as approval of its proposal. Therefore, even assuming that estoppel will ever lie against the Federal government (see Office of Personnel Management v. Richmond, 496 U.S. 414, 422 (1990)), the Board finds that Appellant has not established the existence of the elements necessary to assert an estoppel.

6/ Appellant's filings suggest the possibility that it has not complied with 25 C.F.R. § 103.36 in regard to other BIA guaranteed loans. As mentioned earlier, 25 C.F.R. Part 103 was amended in 2001. Appellant would be well advised to familiarize itself with the new regulations and to ensure that it is in compliance with them.

Appellant also contends: "There was no hearing. No testimony was offered below. No discovery was conducted. No review of BIA documents was permitted." Opening Brief at 3.

The Board finds no merit in these contentions. Appellant was permitted to review BIA documents. A copy of the table of contents of the administrative record that was transmitted to the Board was made available to Appellant prior to the filing of Appellant's opening brief. Appellant reviewed that table of contents, requested copies of documents from the record, and provided additional documents which it believed either should have been in the administrative record or should be accepted as a supplement to the administrative record.

The remaining three contentions concern the fact that no hearing was held in this case. There is no regulatory right to a hearing in a case such as this one. Appellant has not cited any authority for the proposition that a hearing was otherwise required. The Board has previously discussed whether hearings are required in particular types of proceedings before it. It has held that hearings are generally not required because the administrative review process affords interested parties all necessary due process protections. See, e.g., Jackson County, Oregon v. Phoenix Area Director, 31 IBIA 126 (1997); Dawn Mining Co. v. Portland Area Director, 20 IBIA 50 (1991). In this case, Appellant does not even develop an argument that BIA erred by not holding a hearing. It does not attempt to show that there is a material question of fact at issue; nor does it attempt to show what testimony it would have presented at a hearing that would have differed from the arguments it made in this appeal. Finally, it does not identify any information it would have sought in discovery, let alone any information that was not included in the full administrative record made available for Appellant's review. The Board finds that Appellant has not shown that there was a right to a hearing in this case.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Deputy Commissioner's January 14, 2000, decision is affirmed. 7/

//original signed
Kathryn A. Lynn
Chief Administrative Judge

//original signed
Anita Vogt
Administrative Judge

7/ Arguments not specifically addressed here were considered and rejected.